

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Petition of the Cellular)	
Telecommunications & Internet)	WT Docket No. 05-
194		
Association for an Expedited)	
Declaratory Ruling)	
)	

***EX PARTE* COMMENTS OF AARP**

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AARP¹ respectfully submits these comments to the Federal Communications Commission in response to the petition of CTIA – The Wireless Association for a Declaratory Ruling clarifying the regulatory treatment of early termination fees.

AARP's position on early termination fees is clear, concise and unchanged.

AARP opposes the Petition of CTIA seeking a declaration that the early termination fees (ETFs) wireless providers charge its customers are "rates" and therefore subject exclusively to federal regulatory authority. ETFs are terms and conditions subject to state authority, not rates. This interpretation is consistent with the plain language of § 332(c)(3) of the Federal Communications Act, which reserves to the states jurisdiction over "other terms and conditions" of wireless contracts. Moreover, it is consistent with the traditional power of states to regulate commercial activities within their borders. AARP therefore urges that the Commission not adopt CTIA's position that termination fees are rates.

CTIA has failed to provide any legal basis for the Commission to excuse the wireless industry from the neutral application of state consumer protection and

¹ AARP is a nonprofit, nonpartisan organization with more than 39 million members. As the largest membership organization representing the interests of Americans aged 50 and older, AARP is greatly concerned about the health, safety and financial security of older Americans, including those living on low and fixed incomes. AARP advocates for affordable and accessible telecommunications services at both the state and federal level.

contract law, which apply to every other “deregulated” industry in the United States. Contrary to CTIA’s claim, a consumer’s ability to challenge wireless provider’s practices under § 201(b) is not an adequate alternative to the full panoply of state contract and consumer protection remedies.

Because a “rate” must be a charge for communications service, and ETFs are not charges for service, there is also no merit to CTIA’s contention that ETFs are “rates” within the meaning of § 332(c)(3). In fact, ETFs logically fall within the meaning of “other terms and conditions” over which states have jurisdiction. In particular, the legislative history of § 332(c)(3) indicates that regulations related to service and equipment bundling were reserved to the states, and the providers’ comments indicate that one of the putative purposes of ETFs is to subsidize handset costs. Further, the carriers themselves style ETFs as contractual liquidated damages provisions (*i.e.*, a contractual term and condition) and rely on state contract law to enforce ETFs against their customers. Under such circumstances, customers must have symmetric access to the requirements of state contract law and consumer protection defenses.

The wireless providers are also mistaken in their contentions that state regulation of ETFs is “conflict preempted” or will somehow “Balkanize” the wireless industry. The carriers also misapprehend the applicability of the “complete preemption” doctrine. Section 332(c)(3) explicitly confers jurisdiction over wireless “rates” to the federal government and jurisdiction over “other terms and conditions” of

wireless contracts to the states. Because ETFs are “other terms and conditions,” no exercise of state authority over ETFs could conflict with a properly promulgated federal policy. Pursuant to § 332(c)(3), state authority over ETFs *is* federal policy. Against this statutory background, the wireless industry cannot justify preemption of the states’ traditional power to regulate commercial activities within their borders. Moreover, empirical evidence indicates that state-by-state regulation of ETFs has not upset the ability of carriers to offer nationwide service plans. AARP cannot support the wireless industry’s self-serving attempt to avoid the reach of the nation’s consumer protection and contract laws. Indeed, CTIA’s argument that conflict preemption applies in this matter shows that the industry is seeking full immunity from state laws of general applicability. If the FCC grants CTIA’s position, it will in effect nullify § 332(c)(3) contrary to Congressional intent.

For the vast majority of consumers, including many older consumers, the cell phone is an indispensable tool of modern life. With a cell phone, consumers have more freedom and flexibility to stay connected with family and friends, conduct business and coordinate their increasingly busy schedules. Moreover, a cell phone is a safety device in the event of an emergency. It empowers people with a sense of security and confidence that help is always nearby.

Contrary to the carriers’ claims, consumers are deeply dissatisfied by ETFs and do not view them as rates. Significantly, consumer complaints do not end with ETFs. As evidenced from the FCC data regarding informal consumer complaints, consumers have long and repeatedly been subject to unfair and at

times deceptive trade practices by their wireless carriers. Thus, eliminating state law enforcement would leave consumers without an ability to seek redress or any recourse from unfair and deceptive trade practices, while shielding the industry with complete immunity.

Once again, AARP urges the Commission to deny CTIA's Petition to designate ETFs as rates.